In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1133

MICHAEL A. STRAUSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the government failed to comply with a provision of a plea bargaining agreement.

A 78-count indictment returned in the United States District Court for the Southern District of Florida charged petitioner and 21 other individuals with violations of 18 U.S.C. 2, 371, 1341, 1342, 1343 and 2314. Following his plea of guilty to five counts of the indictment, petitioner was sentenced on October 26, 1972, to a term of 30 months' incarceration to be followed by a five-year period of probation.

At the time of his guilty plea, petitioner had entered into a plea bargain with the government that was acknowledged and accepted by the district court. This written agreement provided, *inter alia*:

> Fifth, * * * In any event, the Government will *recommend* that defendant be paroled on all sentences after serving no more than one-third of the sentence imposed by the original trial Court. [Emphasis supplied.]

On August 16, 1973, petitioner filed with the district court a "Motion to Vacate Plea or in the Alternative to Amend Sentence," alleging that the government's failure to *secure* parole for petitioner upon completion of one-third of his sentence constituted a breach of this agreement (Pet. 7). After a full evidentiary hearing, petitioner's motion was denied (Pet. App. A-1). Following that ruling, petitioner filed an application for a writ of habeas corpus with the district court, and he received partial relief.[1] Petitioner's subsequent application for relief was dismissed (Pet. App. A-4 to A-5).

Petitioner appealed all denials to the United States Court of Appeals for the Fifth Circuit, which consolidated the cases on March 25, 1974. In May, 1974, petitioner filed with the court of appeals a motion denominated a "Motion to Amend Original Motion to Vacate Plea Pursuant to 28 U.S.C. 2255, to a Modification of Sentence Only." In this motion, petitioner asked to withdraw his request to vacate his plea and sought as his sole relief a modification of sentence.

On August 9, 1974, petitioner was released on parole. On December 3, 1974, the court of appeals dismissed petitioner's appeals as moot (Pet. App. A-6 to A-7).

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[1]The district court granted petitioner's request that he be incarcerated in a minimum security prison (Pet. App. A-2 to A-3). We have considerable doubt about the court's power to order such relief, but no appeal was taken from the order.

1. The clear and unambiguous language of the plea bargain, which was reduced to writing and signed by respondent, makes plain that the Department of Justice agreed only to *recommend* to the Board of Parole that parole be granted. Petitioner nevertheless contends that his failure to *secure* parole somehow constitutes a breach of the agreement. Such a claim must necessarily fail, for it is not disputed that the Department of Justice has more than fully complied with its agreement to recommend parole.[2] Moreover, the findings of fact made by the district court following a full evidentiary hearing expressly negate any assertion by petitioner that he did not appreciate the difference between a commitment to recommend parole and a guarantee of parole.[3]

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[2]Prior to the Board of Parole taking any action on petitioner's application, the Chief of the Fraud Section of the Criminal Division of the Department of Justice communicated in writing to the Board the Department's recommendation that petitioner be released at or prior to the expiration of one-third of his sentence. When the Board continued Strauss's application pending a progress report in November 1973, the Assistant Attorney General in charge of the Criminal Division petitioned for and obtained from the Board a rehearing concerning petitioner's application for parole and the Department's recommendation that a release date be set. After rehearing was granted, the Chief and Deputy Chief of the Fraud Section personally appeared before the Board of Parole sitting *en banc* and once again recommended parole for petitioner.

[3]The district court found that petitioner, who is a highly educated, intelligent person and was represented by thoroughly competent legal counsel (Tr. 818, 821-822), was never assured by counsel that he would be paroled but simply advised that his chances were great (Tr. 822, 864). Upon the agreement by the government to recommend light sentences (Tr. 851), petitioner was extremely anxious to plead guilty (Tr. 827) and equally happy to have the recommendation for parole (Tr. 822). Petitioner himself, the court found, concluded that his chances of obtaining early parole were 95 percent or better (Tr. 864). His attorney never told him he had a guarantee of parole (Tr. 864), nor did Assistant United States Attorney Tifford directly assure him that parole would be forthcoming (Tr. 863-864). Furthermore, Department of Justice Attorney McTiernan, who directed the final plea bargaining with petitioner, made it clear to petitioner that there was no way the Parole Board could be bound by the prosecutors' recommendation (Tr. 865).

2. The questions presented by petitioner in his request for relief have been rendered moot by his release from custody, as was properly held by the court of appeals (Pet. App. A-6 to A-7). This Court in *Santobello* v. *New York*, 404 U.S. 257, contemplated two possible types of relief if a plea bargain were breached by the government, namely, allowing the withdrawal of the guilty plea, or specific enforcement of the bargain. Because petitioner in this case withdrew his request to vacate his plea, the only alternative is specific performance of the agreement—that is (if we accept petitioner's reading of the agreement), parole. However, since petitioner was released on parole on August 9, 1974, specific performance is no longer necessary or possible, and petitioner's action is therefore moot.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[4]Petitioner is in error in his contention that the holding of the court of appeals in this case conflicts with *Reed* v. *United States*, 471 F.2d 721 (C.A. 5); *Marshall* v. *United States*, 465 F.2d 966 (C.A. 9); *Hupert* v. *United States*, 448 F.2d 668 (C.A. 8); and *Carafas* v. *LaVallee*, 391 U.S. 234. While those cases support the proposition that claims for some forms of relief are not mooted by release from custody, here the only requested relief was release—a claim which obviously became moot when petitioner was granted parole.